No. 83-1935

In the Supreme Court of the United States

OCTOBER TERM, 1984

TONY AND SUSAN ALAMO FOUNDATION, ET AL., PETITIONERS

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Whether the minimum wage, overtime, and record-keeping requirements of the Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.*, apply to work in commercial businesses owned and operated by a religious organization, performed by persons who, while deeming themselves to be volunteers, in fact provide their services to the organization in return for lodging, food, and other in-kind benefits.

2. Whether application of the Act to the commercial operations of a religious organization under these circumstances is constitutional.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 48-67) is reported at 722 F.2d 397. The memorandum and order of the district court (Pet. App. 1-40) is reported at 567 F. Supp. 556. A subsequent order modifying the original order of the district court (Pet. App. 42-45) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 47) was entered on December 5, 1983. Petitions for rehearing were denied on March 1, 1984 (Pet. App. 68). The petition for a writ of certiorari was filed on May 25, 1984, and was granted on October 15, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE AND REGULATIONS INVOLVED

The relevant statutory and regulatory provisions are reprinted at Pet. App. 69-85.

STATEMENT

1. a. The Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, enacted pursuant to Congress's power under the Commerce Clause, requires payment by

covered employers to covered employees of a statutorily-prescribed minimum wage (now $3.35) for all hours worked, and premium payment for overtime (hours worked in excess of 40 per week). 29 U.S.C. 206, 207. In addition, the statute requires covered employers to maintain and provide to the Administrator records concerning all employees and their wages, hours, and other conditions of employment. 29 U.S.C. 211(c).[1]

Employment may be covered under the Act pursuant to either "individual" or "enterprise" coverage. Under "individual" coverage, an employee is subject to the protections of the Act if he works directly in interstate commerce or in the production of goods for interstate commerce. Under "enterprise" coverage, an employee is protected if he is employed in an enterprise engaged in interstate commerce or in the production of goods for interstate commerce, whether or not he is personally so engaged. An "enterprise engaged in commerce" is defined as an "enterprise" (see 29 U.S.C. 203(r) and pages 16-17, *infra*) that has employees engaged in commerce, in the production of goods for commerce, or in handling, selling, or otherwise working on goods or materials that have been moved in or produced for interstate commerce, and that has a gross volume of sales made or business done in excess of a specific dollar volume, now $250,000. See 29 U.S.C. 203(j) and (s).[2]

"Enterprise" coverage under the Fair Labor Standards Act came into being with the 1961 amendments, which substantially broadened the scope of the Act. See *Brennan* v. *Arnheim & Neely, Inc.*, 410 U.S. 512, 516-517 (1973); *Maryland* v. *Wirtz*, 392 U.S. 183, 185-186 (1968). In 1966 Congress further broadened the scope of the Act's coverage when it amended the enterprise provisions to include, inter alia, schools and hospitals, whether

[1] For further detail on the recordkeeping requirements, see 29 C.F.R. 516.

[2] In 1977, Congress raised the annual dollar threshold for enterprises composed exclusively of retail or service establishments to $[illegible]2,550 (effective Dec. 31, 1981). Certain enterprises need not meet the dollar volume test. See 29 U.S.C. 203(s)(3)-(6).

or not operated for profit. See *Maryland* v. *Wirtz*, 392 U.S. at 186-187. See H.R. Rep. 1366, 89th Cong., 2d Sess. 16-17, 37 (1966).

Section 13 of the Act, 29 U.S.C. 213, sets forth a number of exemptions from minimum wage and overtime requirements for certain classes and categories of employee. The requirements do not apply, for example, to bona fide executives, administrators, or professionals (29 U.S.C. 213(a)(1)), to certain retail or service establishment employees (29 U.S.C. 213(a)(2)), or to employees in seasonal recreational establishments (29 U.S.C. 213(a)(3)). Specific exceptions and exemptions such as these have been frequently modified by Congress. In general, the coverage of the Act has been interpreted broadly by the courts, and the exceptions to coverage narrowly. *Arnold* v. *Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960); *Powell* v. *United States Cartridge Co.*, 339 U.S. 497, 516-517 (1950).

Prior to the introduction of enterprise coverage in 1961, the only employees who were covered under the Act were those directly engaged in interstate commerce. Thus, most employees of religious or other non-profit organizations would not have been covered. But see *Mitchell* v. *Pilgrim Holiness Church Corp.*, 210 F.2d 879 (7th Cir.), cert. denied, 347 U.S. 1013 (1954). Under the enterprise coverage concept, however, all of the employees of an "enterprise" are covered. Since the definition of "enterprise" is limited to an organization's activities engaged in for a common business purpose (29 U.S.C. 203(r)), it follows, however, that not all employees of a non-profit organization that is engaged in interstate commerce are necessarily covered. See S. Rep. 145, 87th Cong., 1st Sess. 41 (1961). Departmental regulations provide (29 C.F.R. 779.214 (citation omitted)):

> Activities of eleemosynary, religious, or educational organization[s] may be performed for a business purpose. Thus, where such organizations engage in ordinary commercial activities, such as operating a printing and publishing plant, the business activi-

ties will be treated under the Act the same as when they are performed by the ordinary business enterprise. However, the nonprofit educational, religious, and eleemosynary activities will not be included in the enterprise unless they are [in connection with schools, hospitals, or like activities, as specifically covered by 29 U.S.C. 203(r)(1)].

While the literal language of the Act is exceedingly broad, the legislative history indicates and this Court has made clear that not every worker is an "employee." This Court stated in *Walling* v. *Portland Terminal Co.*, 330 U.S. 148, 152 (1947), that the term "employee" does not extend to persons "who, without any express or implied compensation agreement, might work for their own advantage on the premises of another." *Portland Terminal* concerned the status of railroad brakeman trainees who received a practical course of instruction lasting seven or eight days, learning the skill by observation and by doing actual work under close supervision, "without promise or expectation of compensation." The work did not economically benefit Portland Terminal. 330 U.S. at 149, 152-153. The Court held that such persons are not employees under the Act.

The Department of Labor has applied this concept to other persons who work without any compensation or expectation of compensation, under circumstances indicating that they are working solely for their own purposes or objectives. In determining whether individuals have truly volunteered their services, without any expectation that they will be compensated, the Department considers a variety of factors, including the receipt of any benefits from those for whom the services are performed, whether the activity occupies less than the full-time energies of the individual, and whether the services performed are humanitarian, public welfare, or religious activities that have typically been associated with the work of volunteers.[3]

[3] Illustrative of the volunteer services recognized as such by the Department are those of individuals who, without receipt or contemplation of pay and usually on a part-time basis, help to minister to the comfort of the sick, elderly, indigent, infirm, or handicapped, or who assist charitable, educational or religious organizations by driving vehicles or folding bandages for the Red Cross; working with retarded or handicapped children or disadvantaged youth, or helping in youth programs; providing nursery school and child care assistance for needy working mothers; soliciting contributions or participating in benefit programs for such organizations; and volunteering other services needed to carry out their charitable, educational, or religious programs. See, *e.g.*, *Opinion Letter No. 927*, [Wages-Hours] Lab. L. Rep. (CCH) ¶ 30,939 (May 29, 1968); *Opinion Letter No. 249*, [Wages-Hours] Lab. L. Rep. (CCH) ¶ 30,843 (Apr. 30, 1964); *Opinion Letter No. 626*, [Wages-Hours] Lab. L. Rep. (CCH) ¶ 30,616 (June 28, 1967); *Opinion Letter No. 687*, [Wages-Hours] Lab. L. Rep. (CCH) ¶ 30,681 (Nov. 7, 1967); *Opinion Letter No. 476*, [Wages-Hours] Lab. L. Rep. (CCH) ¶ 30,997.15 (May 16, 1966).

The Department has been extremely reluctant, on the other hand, to excuse employers from their obligations under the Act where regular employees "volunteer" for extra duties in addition to their normal assignments. See Opinion Letter No. 626, *supra*. Such arrangements are frequently conditioned by an implied economic sanction for failing to "volunteer." Thus, where the relationship

In this connection, an opinion letter issued by the Department's Wage Hour Administrator stated that "persons such as nuns, priests, lay brothers, ministers, deacons, and other members of religious orders who serve pursuant to their religious obligations in preschools, schools, hospitals, or other institutions operated by their church or religious order are not considered to be employees." *Opinion Letter No. 1240*, [Wages-Hours] Lab. L. Rep. (CCH) ¶ 30,826 (Dec. 27, 1972). This was consistent with concerns expressed by certain members of Congress in 1966, when the activities of non-profit schools and hospitals were included within the Act's enterprise coverage. At that time, some members stated that, notwithstanding the change, members of religious orders teaching or caring for the sick would not be considered employees under the Act. See 112 Cong. Rec. 11371 (1966) (Rep. Burton); *ibid.* (Rep. Collier).

2. Petitioner, the Tony and Susan Alamo Foundation, is a non-profit religious organization incorporated under the laws of California. The sole members of the corporation are identified as directors Tony Alamo, Susan Alamo (until her death), and Phyllis Gromousky (Pet. App. 6; Pet. Br. App. 7). The "primary purposes" of the Foundation, according to its Articles of Incorporation (Pet. Br. App. 1-10), are to "establish, conduct and maintain an Evangelistic Church" and to undertake certain related activities, including caring for the needy, conducting religious services, teaching classes in the Holy Bible, and doing "those things needful for the promotion of Christian faith, virtue, and charity" (*id.* at 2).

In addition to its evangelistic endeavors, the Foundation operates numerous commercial ventures in four states (Pet. App. 1-5, 49, 51-52). These include gasoline stations, a vehicle repair facility, clothing stores, a restaurant, a telegraph office, a grocery store, establishments that buy and sell personal property, candy and record stores, a motel, a nursery, a building materials store, construction companies, a feed and farm supply company, a hog farm, and a company that lays concrete foundations (*id.* at 2-5). Other Foundation businesses provide services to these various retail and service establishments. For example, Hartford Advertising has provided advertising services to the commercial ventures (Hydell Dep. at 13) and sewing rooms have manufactured clothing sold in Foundation stores (J.A. 156-157, 175, 195). In addition, the various businesses frequently supply each other with goods and services, including meals for employees at job sites (J.A. 170, 218-219) and tools and parts for gasoline stations (Baxter Dep. at 55).

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between an individual and an organization contemplates the payment of compensation for services performed by the individual, the Department will find that services are "voluntarily" performed by that individual only where these services are clearly unrelated to his routine functions. *Ibid.*

The district court found as a fact (Pet. App. 5) that "[t]he businesses owned or operated by the Foundation are ordinary commercial businesses which offer goods and services to the general public in competition with for-profit businesses." The annual dollar volume of sales from the Foundation's businesses in each of the years 1976 through 1979 exceeded the statutory coverage minimum of $250,000 (*ibid.*). Petitioners have conceded (J.A. 47) that the Foundation's businesses operate in interstate commerce.

Management of the Foundation businesses during the period at issue (1975-1979) was highly centralized. Most significant decisions were made by petitioner Tony Alamo personally. Alamo received a daily accounting from each of the businesses; he approved all financial transactions and solved all but the most routine problems (J.A. 143, 188, 194, 197-198). For example, one witness testified that none of the workers was in charge of the service station run by the Foundation; questions "concerning credits or concerning whether or not to order another consignment of gasoline" were submitted to Tony Alamo on a daily basis (J.A. 194). As another former worker testified, every request for money was submitted to Alamo on a daily "finance list." "He will okay whichever expense that he felt was right or whatever; and then, the finance list will come back over the telephone; and by the morning, we knew if the money we put on the finance list was okay to get." J.A. 188.

During this period, the Foundation businesses were staffed primarily by some 300 "associates," who ascribed to the Foundation's religious tenets, lived in Foundation housing, and depended upon the Foundation for most or all of their lodging, food, clothing, and medical benefits.[4]

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[4] The Foundation occasionally hired "outside workers," who were not associated with the Foundation, to perform services that the associates "didn't know anything about" (J.A. 109). Outside workers received cash wages and were "not necessarily [retained] until the job was done, but until the brothers or sisters [i.e., associates] could get an idea on how to do the job" (J.A. 136, 154). See Pet. App. 29-34.

The associates did not receive ordinary cash wages for their work in the Foundation businesses and the Foundation did not keep contemporaneous records of their hours worked or jobs performed.

Evidence regarding the number of hours worked by the associates varied, but, as the district court noted (Pet. App. 9), witnesses "testified that they were required to work as long as 12 to 15 hours per day, 6 or 7 days per week." The associate in charge of scheduling for the restaurant and sewing room testified that the regular waitresses at the restaurant worked "from twelve to sixteen hours a day," seven days a week, with the only time off for attendance at Sunday services (J.A. 120-121). Regular hours in the sewing room were 8:00 or 8:30 a.m. until 8:00 p.m., and the sewers would "frequently" work "three or four days straight in a row without any sleep or even a break" (J.A. 121-122). See also J.A. 107-108 (construction crews would work from 6:30 a.m. until sundown on outside projects and from after dinner until 11:00 p.m. to 2:00 a.m. on Foundation projects, six days per week); J.A. 139-141 (drivers' and clothing store workers' regular hours were 9:00 a.m. to midnight, at least six days per week). The sewing room went on eight-hour shifts at one point "because there was something going on with the labor department" (J.A. 158).

Associates typically held a wide variety of positions in the Foundation's businesses. Associates tended to change jobs often (J.A. 133), at the direction of Tony Alamo or, indirectly, though instructions by other "brothers and sisters" (J.A. 108, 132, 140, 159, 193-194, 198, 200, 201). They were employed almost interchangeably in the various businesses. For example, within one and one half years, one associate worked at two clothing stores and two service stations in two different communities (J.A. 191-202). See also J.A. 132-136. In addition to serving fulltime positions, associates worked in other positions as the need arose (J.A. 59-60, 96, 199). Thus, associates often worked a full day at one establishment only to work several hours more at another—sometimes late into the night (J.A. 107-108, 150-151, 161).

Some associates obtained outside employment. These individuals endorsed their paychecks to the Foundation (Pet. App. 8, 10; J.A. 52, 207). Some of them, involved in various aspects of the construction trade, contracted with outside parties to perform specific services (Pet. App. 8). Payment for the construction work was generally made by the clients to the crew leader, who would remit the entire amount, sometimes deducting for costs incurred, to the Foundation (J.A. 64-65, 131-132, 134-135, 186).

In addition to their commercial labors, associates generally performed religious functions, such as witnessing, sharing the Gospel, or praying with others (J.A. 49, 73). However, a former associate testified (J.A. 178) that, although "[t]he original emphasis of the Foundation when it started was the witnessing, * * * as time went on and the Foundation grew and there were more and more businesses, there was less and less witnessing * * *. [I]t became more and more work as time went on." To similar effect, see J.A. 150, 165.

Associates did not expect or receive cash wages for their work.[5] However, as the district court found (Pet. App. 8), "they did expect the Foundation to provide them food, shelter, clothing, transportation, and medical benefits." As Tony Alamo has acknowledged (J.A. 92-93), "numerous" families were "dependent" upon these benefits provided by the Foundation for their subsistence. This dependency upon the Foundation's in-kind benefits was confirmed by many witnesses. See, *e.g.*, J.A. 61, 74, 213, 216-220. Testimony by one representative associate (J.A. 78) is typical:

> Q. And, of course, you do expect the benefits?
>
> A. Well, the benefits are just a matter of—of course[.] [W]e went out and we worked for them.

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[5] In late 1977 or early 1978, however, some associates started to receive small sums in cash—usually $5 per week. J.A. 160; see *id.* at 148, 217.

See also J.A. 64-65. Not only did the associates expect to receive these benefits in return for their work, but the level of benefits received appeared to be dependent, to some degree, on the work performed. For example, a salesman at the Foundation clothing stores received a percentage commission on each sale, to be credited toward purchases at other Foundation stores (J.A. 146, 153). Associates employed in other Foundation businesses would be fined for instances of poor performance, such as spilling gasoline on the ground, breaking merchandise, or saying the wrong thing to a customer (J.A. 148-149). Associates were forbidden to obtain food from Foundation sources when they were not working—even when the absence was caused by inclement weather or the need to care for sick children (J.A. 218-219).

Moreover, some former associates believed, erroneously, that they had a legal interest in the Foundation's assets (Pet. App. 8). As one former associate expressed it (J.A. 189):

> We all understood that the foundation became rich and so that we were all rich. We were all part of the foundation.
>
> It came to my understanding just before I left * * * the foundation—that legally, we were—we didn't have no rights whatsoever belonging to the foundation and that the real owners legally were only Tony and Susan Alamo.

Another stated that she "was led to believe * * * that we were shareholders in their non-profit California corporation * * *. But, in reality, you know, when I got out I realized that the only share we had was to work for and to maintain and to live in Tony's and Sue's properties and businesses" (J.A. 178-179). See also J.A. 75-76.

The associates who testified at trial stated, without exception, that they viewed the work they performed for the Foundation as "volunteering" (Pet. App. 7). However, virtually all of the associates in fact worked (J.A. 109-110); as one associate stated (J.A. 76), "if you want to eat, you've got to work." Other evidence suggested that pressure was brought to bear to prevent associates from

leaving the Foundation. One former associate testified (J.A. 181) that "I could not have left the Foundation on my own. I was afraid to." Another explained (J.A. 129) that she and her family had left the Foundation at three o'clock in the morning "[b]ecause we were afraid of physical violence, physical harm to us." See also J.A. 168-169.

3. On December 19, 1977, respondent, the Secretary of Labor, filed an action against petitioners in the United States District Court for the Western District of Arkansas. The Secretary alleged that petitioners had violated the minimum wage, overtime, and recordkeeping provisions of the Act, 29 U.S.C. 206(b), 207(a), 211(c), 215(a)(2) and (5), with respect to more than 300 associates.[6] On December 10, 1982, following a bench trial, the district court issued a memorandum and order holding that petitioners had violated the Act's recordkeeping, minimum wage, and overtime provisions, and ordered injunctive and restitutionary relief. The district court found that the Foundation's businesses "operated * * * under common control for common business purposes * * * in competition with other commercial business" and therefore determined that they constituted a single "enterprise" subject to the requirements of the Act (Pet. App. 35). See 29 U.S.C. 203(r). The court also found that the associates were "totally dependent upon the Foundation" for their subsistence (Pet. App. 10) and concluded that, as a matter of economic reality, the associates expected the Foundation to support them (*id.* at 37):

> The associates contemplated they would be fed, clothed, sheltered and provided other forms of bene-

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[6] The Secretary also charged petitioners with failing to compensate certain "outside workers," Foundation employees who were not associates (see note 4, *supra*), at the proper overtime rate pursuant to 29 U.S.C. 207(a) (Pet. App. 29, 49). The district court made specific factual findings concerning the hours worked by each named employee (*id.* at 30-34), which, with one exception (*id.* at 66-67), the court of appeals upheld (*id.* at 49). Petitioners have not sought review of this portion of the case.

> fits as a result of their work at the Foundation's commercial businesses. Such benefits are simply wages in another form.

In addition, the court noted that several former associates expected to share in the profits of the Foundation's commercial ventures (*id.* at 8). Accordingly, the court ruled that the associates were petitioners' employees within the meaning of the Act, 29 U.S.C. 203(e)(1), 203(g) (Pet. App. 37).

Finally, the district court rejected petitioners' constitutional claims. Petitioners had maintained that application of the Act to the Foundation businesses violated its associates' rights to freely exercise their religion and fostered excessive government entanglement with the Foundation's religious mission. The court held that application of the Act to the commercial activities of a non-profit religious organization is rationally related to the statutory goal of protecting competitors against unfair competition; that there is no proof of discriminatory prosecution by the Secretary; and that application of the Act violates neither the Free Exercise Clause nor the Establishment Clause of the First Amendment. Pet. App. 35-36.[7]

4. The court of appeals affirmed the district court's holding as to liability, but vacated and remanded as to the appropriate remedy (Pet. App. 66).[8] The court of

[7] As remedy, the court ordered that all former associates and "all persons * * * who have worked in [specified] businesses of the Foundation" be advised of their eligibility to submit a claim to the Secretary (Pet. App. 44). The court instructed the Secretary to consider all claims and submit to the Court proposed findings "of back wages due each claimant * * * less applicable benefits" that had been provided by the Foundation (*ibid.*). The Secretary appealed the remedial portions of the order.

[8] The court of appeals rejected the district court's requirement that associates initiate backpay proceedings (Pet. App. 61-63, 65). Instead, the court of appeals held, because petitioners "failed to provide [the records detailing hours worked by employees] which [they are] obliged to preserve," the district court must employ "'the most accurate basis possible under the circumstances'" for calculating back wages due (*id.* at 65, quoting *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 688 (1946)). Therefore, the court of appeals remanded the case to the district court "for determination of the amounts of wages owing, such determination to be based either upon the present record or as supplemented by such additional evidence as the District Court may afford the parties an opportunity to offer" (Pet. App. 66). By an unreported memorandum and order dated September 10, 1984, the district court identified specific associates due back wages and ordered the Secretary to submit a proposed judgment. Prior to entry of final judgment, and following this Court's writ of certiorari, the district court "administratively terminate[d]" the action pending this Court's decision.

appeals agreed that the associates, who "expect[ed] to receive * * * [the] benefits of lodging, food, transportation, and medical care," were Foundation employees (*id.* at 50, 53).

The court also held that application of the Act to the Foundation employees did not violate the Establishment Clause because the Act is "secular social legislation of an economic character" (Pet. App. 56), which neither advances nor inhibits religious practice (*id.* at 59-60) and does not foster excessive government entanglement with religion (*id.* at 56-59). The court distinguished this Court's holding in *NLRB* v. *Catholic Bishop*, 440 U.S. 490 (1979), finding that application of the FLSA to the Foundation was far less intrusive than application of the NLRA to teachers in religious schools.

Application of the FLSA here did not violate the Free Exercise Clause, the court concluded, because "enforcement of wage and hour provisions cannot possibly have any direct impact on [petitioners'] freedom to worship and evangelize as they please" (Pet. App. 60) and because the indirect impact was solely financial (*id.* at 60-61). "[L]egislation otherwise legitimate does not violate the Free Exercise Clause merely because financial detriment results" (*id.* at 61). In short, the court stated, "[t]here is surely no constitutional right, under the religion clauses of the First Amendment, to pay substandard wages" (*id.* at 59).

SUMMARY OF ARGUMENT

The Court's attention is drawn in this case to a matter which Congress has specifically considered and decided—

the status of religious and other non-profit organizations under the Fair Labor Standards Act. The arguments made by petitioners in the guise of statutory and constitutional construction are in fact issues of policy. The lines Congress has drawn, between the commercial and the non-commercial activities of non-profit organizations and between persons who labor with the expectation of compensation (whether cash or in-kind) and those who work as non-paid volunteers for their own purposes, strike an appropriate balance between the competing interests. We submit that Congress's resolution of these questions, although perhaps not the only conceivable resolution, is well within its range of discretion under the Constitution.

It must be emphasized at the outset that this enforcement proceeding applies solely to work performed in the commercial businesses of the Foundation. The case does not touch in any way upon the Foundation's core religious functions of worship, liturgy, doctrine, prayer, preaching, or internal organization, in which government may play no part short of protecting against threats to public safety, order, or other fundamental interests. Nor does it involve the difficult middle ground of charitable, educational, or similar activities that may be viewed as religious by the religious organization, but have significant secular dimensions from the viewpoint of government. This case, by contrast, involves relatively well-settled principles applied to the commercial sector. It is here that petitioners' privileges under the Religion Clauses are at their lowest ebb.

The statutory arguments of petitioners are simply stated and easily answered. They contend that their businesses, though concededly engaged in interstate commerce (J.A. 47), do not fall within the definition of "enterprise" because, as a tax-exempt religious organization, the Foundation lacks a common "business purpose"; and they contend, purely on the basis of testimony characterizing their associates as "volunteers" who do not "expect" "wages" or "compensation," that the associates are not "employees" under the Act. However, Congress explicitly understood and intended that the commercial operations

of tax-exempt, non-profit organizations be covered within the definition of "enterprise." H.R. Rep. 75, 87th Cong., 1st Sess. 8 (1961); S. Rep. 145, 87th Cong., 1st Sess. 41 (1961). And the status of apparent employees cannot be determined solely upon characterizations agreed upon by employer and employee, lest the protections of the Act be bargained away. See *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697, 707 (1945). Here, the district court found, and the court of appeals agreed, that the Alamo associates in fact expected substantial in-kind benefits in exchange for their labors. That finding is sufficient to establish "employee" status under the Act in this context.

Petitioners' constitutional contentions are more difficult to state. They suggest that, in some way, imposition of a minimum wage upon the associates would violate their Free Exercise rights. However, they fail to establish—or even allege—that acceptance of compensation at statutory levels would violate the religious tenets of the associates. The associates in fact accept substantial in-kind compensation, own property, in some cases earn wages, and state no objection to an above-subsistence standard of living. In short, there is no Free Exercise violation because there is no claim that application of the Act will require the associates to take any action that would violate their beliefs, or to refrain from any action mandated by their beliefs.

Petitioners' Establishment Clause argument is deficient for essentially the same reasons that are fatal to their statutory argument: the Act affects only the Foundation's commercial operations and does not interfere with, or intrude into, matters of faith. Insofar as a religious organization chooses to enter the secular marketplace in competition with others, it is subject to secular regulation on neutral terms.

ARGUMENT

I. THE COMMERCIAL OPERATIONS OF PETITIONER ARE SUBJECT TO THE REQUIREMENTS OF THE FAIR LABOR STANDARDS ACT

A. The Commercial Operations Of A Non-Profit Religious Organization Are Subject To "Enterprise" Coverage Under The Act

Petitioners contend (Br. 28) that the Foundation businesses "do not fall within the meaning of the word 'enterprise' as defined by Section 3(r) of the Fair Labor Standards Act (29 U.S.C. § 203(r)) in that [the Foundation] has not performed related activities for a common business purpose but has operated the aforesaid activities exclusively for religious purposes."[9] In support of this argument, petitioners note (Br. 26 (emphasis deleted)) that the Foundation has secured an exemption from taxation under Section 501(c)(3) of the Internal Revenue Code as "a corporation organized and operated exclusively for religious purposes," and (Pet. Br. 27) that the district court found that the Foundation's "evangelistic work" has "provided spiritual and moral assistance to many people who lacked direction or purpose in their lives" (quoting Pet. App. 6-7).

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[9] It is undisputed that the Foundation businesses operate in interstate commerce (J.A. 47) and that their annual volume of business exceeds $250,000 (PX 1; see Pet. App. 5). It is also clear that the Foundation's commercial ventures are "related activities" under "unified operation or common control." The various businesses are highly interdependent, providing each other with supplies and services; associates were freely interchanged among the various businesses; and management was highly centralized, with most decisions made by petitioner Tony Alamo personally. See pages 6-8, *supra*. Such "auxiliary activities" (H.R. Rep. 75, 87th Cong., 1st Sess. 8 (1961); S. Rep. 145, 87th Cong., 1st Sess. 41 (1961)) are deemed related and for a common purpose because they are "operational[ly] interdependen[t]." *Brennan* v. *Veterans Cleaning Service, Inc.*, 482 F.2d 1362, 1367 (5th Cir. 1973); accord, *Donovan* v. *Easton Land & Development, Inc.*, 723 F.2d 1549, 1551 (11th Cir. 1984).

However, qualification for a tax exemption as a nonprofit religious organization does not mean that commercial activities undertaken by the organization do not have a "common business purpose" within the meaning of the Fair Labor Standards Act.

This enforcement proceeding applies solely to work performed in the commercial businesses of the Foundation. It does not apply to the Foundation's religious or charitable work, or to any work performed internally for the benefit of the Foundation's uncovered activities rather than in commerce. The district court specifically held (Pet. App. 36 (emphasis added)) that "[t]he people who worked *in the Foundation's commercial businesses* • • • are 'employees' of the [petitioners] within the meaning of the Act," and provisionally excluded from its remedy (*id.* at 38-39) all work by associates in a "non-commercial" part of the Foundation's activities or in an "exempt" activity as defined by 29 U.S.C. 213(a), as well as all work for outside employers. See also Pet. App. 9-10.

As to petitioners' commercial activities, the district court held (Pet. App. 35): "Even though the Foundation is incorporated as a nonprofit religious organization, the identified businesses are engaged in ordinary commercial activities in competition with other commercial businesses." The holding that the commercial businesses of the Foundation constitute an "enterprise" within the meaning of the Act is in accord with established law, and supported by the language of the Act, the Department's regulations, judicial precedent, and legislative history.

Certainly, nothing in the language of the Act supports petitioners' interpretation. An enterprise is plainly defined as "related activities performed • • • by any person or persons for a common business purpose" (29 U.S.C. 203(r)). The Act includes no special exclusion of nonprofit or religious organizations from this definition. If such organizations carry on activities for a "business purpose," they are covered. Merely because an organization may be tax-exempt does not mean that its activities have no "business purpose."

This interpretation is reflected in the Department's interpretive regulation defining "business purpose." The regulation, 29 C.F.R. 779.214, explicitly recognizes that "[a]ctivities of eleemosynary, religious, or educational organizations may be performed for a business purpose." The regulation then provides that "where such organizations engage in ordinary commercial activities, such as operating a printing and publishing plant, the business activities will be treated under the Act the same as when they are performed by the ordinary business enterprise."

This administrative interpretation of the statute is entitled to considerable weight. *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944); see *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). Moreover, this interpretation of the Act has been uniformly upheld by the courts. *Marshall* v. *Woods Hole Oceanographic Institute*, 458 F. Supp. 709, 718 (D. Mass. 1978) (non-profit scientific research corporation has business purpose because it competes for contracts under the same terms as a commercial organization); *Marshall* v. *Elks Club of Huntington, Inc.*, 444 F. Supp. 957, 967-968 (S.D. W.Va. 1977) (restaurant run by non-profit fraternal organization has a business purpose because it is undertaken in competition with commercial businesses); *Marshall* v. *First Baptist Church*, 23 Wage & Hour Cas. (BNA) 386 (D. S.C. 1977) (day care center operated by a church has a business purpose); cf. *Mitchell* v. *Pilgrim Holiness Church Corp.*, 210 F.2d 879, 882 (7th Cir.), cert. denied, 347 U.S. 1013 (1954) (publishing and distribution plant operated by church covered by Act); *McClure* v. *Salvation Army*, 460 F.2d 553, 557 (5th Cir.), cert. denied, 409 U.S. 896 (1972) (non-profit religious organization that affects commerce is not exempt from Title VII).

Congress has specifically confronted and resolved the very question whether operations of a non-profit organization can be deemed an "enterprise." When enterprise coverage was added to the Act in 1961, Congress recog-

nized the possibility that non-profit groups might fall within the Act's definition of enterprise and indicated its intention that the Act cover the ordinary commercial activities of such organizations. See S. Rep. 1744, 86th Cong., 2d Sess. 28 (1960).

When the bill providing for enterprise coverage first was considered in 1960, Senator Goldwater proposed an amendment that would have exempted from the definition of "employer" in Section 3(d) of the Act any tax-exempt organization under Section 501(c)(3) of the Internal Revenue Code. 106 Cong. Rec. 16703. The amendment was rejected (*id.* at 16704). The objection to the amendment, as Senator Kennedy (floor manager of the bill) stated, was that "the language of the * * * amendment goes beyond the language of the report." He explained that if an "eleemosynary institution" owned a commercial business, it "might be exempt, under the language of the * * * amendment, but not under the language of the report" (*ibid.*). Even Senator Goldwater, author of the proposed amendment, agreed that " a church which has a business operation on the side" should be subject to the Act (*id.* at 16703), and was simply concerned that the language of the Act, in the absence of a specific exemption, might be read too expansively (*ibid.*). Thus, he agreed with Senator Kennedy that "a charitable or a religious group which owned a brewery, a library, or a winery * * * would not be exempt." *Ibid.*

Petitioners' interpretation of the Act, which would exempt all activities of tax-exempt organizations from coverage, would thus go farther than even proponents of the failed amendment intended to go. There was a broad consensus in Congress that the commercial activities of non-profit and religious organizations should be covered.

The following year, when the legislation was again considered and this time enacted, Senator Curtis proposed the same amendment that Senator Goldwater had un-

successfully proposed the preceding year. Again the amendment failed. 107 Cong. Rec. 6255 (1961). In connection with the debate on the amendment, Senator McNamara, chairman of the committee that reported the bill, explained that under the enterprise provision, groups operating for charitable and religious purposes would be exempt from coverage "except as [they] engage in the printing industry or in other activities which compete with private industry to such a degree that the competition would have a very adverse effect on private industry • • •. [W]hen such [a group] comes into competition in the marketplace with private industry, we say that their work is not charitable organization work." *Ibid.* Senate and House reports on the 1961 legislation stated that the "[e]leemosynary, religious, or educational and similar activities" of non-profit organizations are "not included in the term 'enterprise'" because "[s]uch activities performed by non-profit organizations are not activities performed for common business purpose." H.R. Rep. 75, 87th Cong., 1st Sess. 8 (1961); S. Rep. 145, 87th Cong., 1st Sess. 41 (1961). Accordingly, the congressional intent is clear and unambiguous. The mere fact that petitioner Foundation is a non-profit religious organization does not make its commercial activities exempt from coverage under the Act.

Nor is there anything about the specific businesses of the Foundation that would cast doubt on the conclusion of the courts below that they are operated for business purposes. There may be instances in which commercial and religious activities are so closely related that they are difficult to distinguish, but the Foundation's businesses here are not close to the line. Gasoline stations, automobile repair shops, retail stores, restaurants, telegraph offices, motels, feed and farm supply companies, hog farms, and construction companies fall plainly within the compass of the term "business." That they generate revenue for a religious organization does not diminish their commercial nature or their impact on commerce.

Just as the evangelist does not become a mere book agent by selling the Bible (*Murdock* v. *Pennsylvania*, 319 U.S. 105, 111 (1943)) (see Pet. Br. 36), a hog farm does not become a church merely because the individuals working on it are evangelists. See *Prince* v. *Massachusetts*, 321 U.S. 158, 170-171 (1944).

Petitioners state (Br. 28) that the "Foundation's activities operate at a loss" and claim that this is "further evidence" of their non-commercial purposes. However, petitioners also acknowledge (*id.* at 28-29) that "[t]he Foundation's activities are merely means by which the associates defray their living expenses during their endeavor to promote religious doctrines and beliefs," and that the Foundation's businesses are intended "to generate income to pay expenses necessarily incurred in its efforts to spread the Gospel" (*id.* at 36). See also Pet. App. 8 (district court finding that the Foundation's commercial businesses are one of its "principal sources of income" and that it does not solicit contributions from the general public). Commercial activities, undertaken to provide money to "defray" expenses or to "generate income" are subject to enterprise coverage under the Act. In Senator Goldwater's words (106 Cong. Rec. 16703 (1960)), "a church which has a business operation on the side" is subject to the Act.

Petitioners suggest (Br. 27-28), relying on testimony by petitioner Tony Alamo, that the Foundation's businesses are non-commercial because they are used as opportunities for evangelism (as "churches in disguise") and for rehabilitation of associates who are former drug addicts or criminals. See also Pet. Br. 6-7. However, this testimony suggests at most that there may have been mixed motivations for conducting the businesses. Even assuming arguendo that the subjective motivation of the apparent employer is relevant to the question, petitioners provide no reason for concluding, contrary to the courts below, that the religious purposes so outweigh the business purposes that the Act should not apply. The court of appeals, "[u]pon careful reflection" (Pet. App.

51), concluded that the Foundation's activities had "overstepped the dividing line" between secular endeavor and sacred functions and become subject to the requirements of the Act. Observing the "extensive scope and substantial character of the foundation's commercial operations" (*ibid.*), and emphasizing that the Foundation's "businesses serve the general public, in competition with other private entrepreneurs" (*id.* at 52), the court stated (*id.* at 53 (footnote omitted)):

> Under the "economic reality" test it would be difficult to conclude that the extensive commercial enterprise operated and controlled by the foundation was nothing but a religious liturgy engaged in bringing good news to a pagan world.

More fundamentally, we are troubled by the suggestion that the Department of Labor might be required to evaluate coverage under the Act on the basis of subjective considerations of religious motivation. It would take little imagination to formulate plausible secondary religious purposes for many commercial enterprises. Indeed, one need not go much further than the court of appeals' invocation of the saying, "laborare est orare" (Pet. App. 50), to see that providing opportunities for employment and for evangelism on the job could easily be considered to be a religious purpose for virtually any commercial activity. Yet so expansive an exemption from coverage of the Act would run directly contrary to the congressional judgment that commercial activities of nonprofit organizations should be covered by the Act. The key considerations must be objective factors concerning the nature and extent of the activities in question. On the basis of such factors, no one could suggest that the courts erred in reaching the conclusion that the Foundation's businesses had a business purpose.

B. Alamo "Associates," Who Worked For In-Kind Benefits Instead Of Cash Wages, Were "Employees" —Not Volunteers—Within The Meaning of the Act

The Act broadly defines "employee" as "any individual employed by an employer," and "employ" as including

"to suffer or permit to work" (29 U.S.C. 203(e)(1), 203(g)). This definition is exceedingly broad. *United States* v. *Rosenwasser*, 323 U.S. 360, 362-363 (1945). It is not, however, without its natural limits. See *Walling* v. *Portland Terminal Co.*, 330 U.S. 148 (1947). The determination whether a particular relationship is one of "employer" to "employee" depends not on "isolated factors but rather upon the circumstances of the whole activity." *Rutherford Food Corp.* v. *McComb*, 331 U.S. 722, 730 (1947).

Relying on *Portland Terminal*, petitioners contend (Br. 20) that the Alamo associates are not "employees." They state that "a person who intends his services to be voluntary and to be rendered without compensation is not an 'employee' within the meaning of the Fair Labor Standards Act." As explained above (pages 4-6), the Department recognizes that persons who work without compensation or expectation of compensation, under circumstances that suggest that they do so for their own pleasure or objectives, are not "employees." However, we do not agree that the Foundation's associates fall within this category.

Petitioners state (Br. 20) that the associates' "efforts were not for material reward and were not given in expectation of benefits such as food and shelter." They base this assertion almost solely (Br. 13-16) on statements by representative associates regarding their expectations. For example, Bill Levy, an associate, stated (J.A. 62): "I've never expected any compensation, any wages, nor do I eve[r] expect to receive any compensation or wages for what I do, for what I do for the ministry of God."

However, the district court (Pet. App. 36-37), affirmed by the court of appeals, held that the persons who work in petitioners' commercial businesses are "employees" within the meaning of the Act. The court reached this conclusion because of the "economic reality" that "[t]he associates contemplated they would be fed, clothed, sheltered and provided other forms of benefits as a result of their work at the Foundation's commercial businesses.

Such benefits are simply wages in another form" (*id.* at 37).[10] The court of appeals, in a similar vein, stated (*id.* at 50):

> [The associates] claim to be volunteer workers and to expect no compensation. They do expect to receive (and indeed otherwise many of them could not live without resort to public assistance or crime) the aforementioned benefits of lodging, food, transportation, and medical care.

To the extent that petitioners' argument is simply that the lower courts' conclusions that the associates expected compensation were "erroneous[]" as a factual matter (Pet. Br. 19), their argument is barred by this Court's rule against reviewing the factual findings concurred in by the two lower courts. *Branti* v. *Finkel*, 445 U.S. 507, 512 n.6 (1980); *Graver Tank & Manufacturing Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949). Both courts having examined the record and concluded that, in fact, the associates expected to receive the benefits in return for working, there is no reason for this Court to reexamine that conclusion.

If petitioners are contending that, as a matter of law, the Secretary cannot "meet his burden of proof" without producing testimony from workers that they expected wages or compensation for their work (Pet. Br. 20), such an argument should be roundly rejected. Consistent with the established jurisprudence under the Act and the purposes of the statute, the courts must look to objective evidence of what the workers received and whether they expected to receive it. While not irrelevant, the workers' testimony regarding their expectations cannot be dispositive where the objectively ascertainable facts—such as actual receipt of benefits and prior knowledge that those benefits would be provided if the work were performed—are inconsistent with the workers' characterizations. In such a case, the employee's testimony

[10] The Act defines "wage" as including the cost of board, food, lodging, and similar benefits customarily furnished by the employer to the employees. 29 U.S.C. 203(m).

that he did not "expect" compensation may mean no more than that he did not demand additional compensation. For example, Donald Wylie testified that "I knew good and well I'd get no wages," and commented that "[i]nasmuch as I knew I was getting no wages, I suppose you could call me a volunteer, right." J.A. 117.

To regard characterizations of agreements made between the parties as dispositive of their obligations under the Act would undermine a major premise of the legislation. Were forms of words permitted to determine employee status, employers might take advantage of their superior bargaining power to induce workers to forego employee status all or part of the time in exchange for needed subsistence. See *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697, 707 (1945). Rights under the Act cannot be waived "because this would 'nullify the purposes' of the statute and thwart the legislative policies it was designed to effectuate." *Barrentine* v. *Arkansas-Best Freight System*, 450 U.S. 728, 740 (1981), quoting *Brooklyn Savings Bank* v. *O'Neill*, 324 U.S. at 707. The courts must therefore look beyond the agreements and understandings of the parties to answer the critical question whether coverage of an individual is within the contemplation of the Act. See *Rutherford Food Corp.* v. *McComb*, *supra*; *Goldberg* v. *Whitaker House Cooperative, Inc.*, 366 U.S. 28, 33 (1961); *Real* v. *Driscoll Strawberry Associates, Inc.*, 603 F.2d 748, 755 (9th Cir. 1979); *Usery* v. *Pilgrim Equipment Co.*, 527 F.2d 1308, 1315 (5th Cir.), cert. denied, 429 U.S. 826 (1976).[11] Here, although the associates claimed to be working in the Foundation's businesses as volunteers, there was ample evidence to justify the courts below in concluding that the associates did not labor "without promise or ex-

[11] A close analogy may be drawn to the question whether the transfer of a thing of value to an individual is a "gift" or whether it is taxable compensation for services rendered. As here (and for similar reasons), the characterizations of the transaction by the parties involved cannot be deemed dispositive. See *Commissioner* v. *Duberstein*, 363 U.S. 278, 291-292 (1960).

pectation of compensation" (*Walling* v. *Portland Terminal Co.*, 330 U.S. at 152).[12]

Although they undoubtedly had a variety of motives for working in the Foundation's businesses, the Alamo associates understood that they were supporting themselves by their work. Indeed, as the district court found (Pet. App. 10), "most of the associates of the Foundation are totally dependent upon the Foundation." The in-kind benefits provided to them are their sole source of support. It is fanciful to suggest that they would—or even could—continue working such long hours (often 12-14 hours per day, six or seven days per week) in the Foundation's businesses if they were not being paid these benefits.[13]

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[12] For their argument that the associates were volunteers rather than employees, petitioners rely heavily on *Turner* v. *Unification Church*, 473 F. Supp. 367 (D. R.I. 1978), aff'd, 602 F.2d 458 (1st Cir. 1979), a case brought by a former member of a religious organization for, inter alia, back wages alleged to be due under the FLSA for services soliciting money and selling such items as candy, flowers, and tickets to the organization's rallies. However, in *Turner* the court expressly found that the plaintiff's labors "cannot be termed voluntary or gratuitous" (473 F. Supp. at 377). The basis for the court's rejection of the plaintiff's claim is apparently that the Act does not reach work performed under conditions of involuntary servitude (*ibid.*)—a holding that knows no support in the law. Alternatively, the decision could be interpreted as holding, on the facts of that case, that the plaintiff proffered her services "without expecting any tangible compensation" (*ibid.*). Here, the district court's factual finding was to the contrary.

In *Rogers* v. *Schenkel*, 162 F.2d 596 (2d Cir. 1947), also relied upon by petitioners, the worker received no compensation of any kind for his services.

[13] Petitioners imply (Br. 21) that because one associate had "some money from an investment that I lived off of" (J.A. 72), and that another former associate had some trust income (J.A. 112), this Court should reject the findings of both lower courts that most associates were totally dependent on the benefits received from the Foundation. However, both petitioner Tony Alamo and numerous present and former associates have testified that the associates were dependent on those benefits. See page 9, *supra*. Even the

Evidence in the record is inconsistent with petitioners' apparent contention that the in-kind benefits were a generous bounty provided to the associates, rather than a form of compensation for services rendered. For example, one representative associate, Ann Elmore, was asked: "Was there ever anytime that you've been with the Foundation • • • that you've come to expect compensation or wages?" She answered, "No, sir. I can truthfully say it never even so much as entered my mind." Nonetheless, when asked whether she "expect[ed] the benefits," Ann Elmore replied that "the benefits are just a matter of—of course." Then she added, "we went out and we worked for them." J.A. 78. Apparently, her statement that she did not expect "compensation" meant that she expected no cash wages (and, of course, she received none). She clearly expected to receive the in-kind benefits; she had "worked for them." See also J.A. 64-65 (testimony that benefits were directly provided out of earnings from the associates' labors).

There was testimony that every associate in the State of Arkansas worked in one or more of the Foundation's businesses (J.A. 109-110). The courts below were justified in inferring that this indicated that such work was an obligation. Moreover, as discussed in the statement (page 10, *supra*), the associates' benefits often were directly related to the quality of the work they performed. Commissions were based on the volume of sales; associates were docked a portion of their expected benefits for various instances of poor performance; and their allocations of food were affected when they were unable to work. This nexus between work performed and benefits

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associate with the investment income stated that she was "completely and totally supported by the Foundation" (J.A. 74).

Petitioners also assert (Br. 21) that "it was not uncommon for the associates to go outside the Foundation to secure jobs." They cite the example of Bill Levy (J.A. 51). Petitioners fail to point out, however, that Bill Levy and other associates working outside the Foundation would turn over their entire paychecks to the Foundation (J.A. 52, 186, 207). Willingness to do so was apparently a condition to permission to accept outside employment. See J.A. 186.

received refutes any suggestion that the benefits were freely given as part of life in the religious community; rather, the benefits were conditioned on the performance of revenue-producing labor.

Moreover, former associates testified that they had believed (erroneously) that they had a legal interest in the assets of the Foundation. They "understood that the foundation became rich and so that we were all rich" (J.A. 189), and were led to believe that they were "shareholders" in the corporation (J.A. 178).[14] These statements show that the associates expected to receive a form of deferred compensation for their work; the statements are quite inconsistent with the status of volunteer.

Under these circumstances, the expectation that financial support will be provided in return for services rendered calls into play precisely the concerns addressed by Congress in enacting the Fair Labor Standards Act. The Act was intended to protect individuals who worked to support themselves from the ill effects of substandard living conditions, by ensuring that they receive minimum compensation from their labor. See *Powell* v. *United States Cartridge Co.*, 339 U.S. 497, 516 (1950); *A.H. Phillips, Inc.* v. *Walling*, 324 U.S. 490, 493 (1945). This protection is provided whether or not individuals desire it or think they deserve it. The Alamo associates have chosen to work for the Foundation's businesses in exchange for in-kind benefits; the law does not permit the level of compensation paid to them to fall below the statutory minimum.

Moreover, Congress's objective of protecting legitimate businesses from competition from employers paying substandard wages is implicated as well. A primary objective of legislation extending the Fair Labor Standards Act is to prevent unfair competition by employers who

[14] Only upon leaving the Foundation did former associates learn that they had no legal interest in the Foundation's assets: "the only share we had was to work for and to maintain and to live in Tony's and Sue's properties and businesses * * *. [T]hey were making quite a profit off of us and we were getting no salary, benefits, or rights" (J.A. 179). Accord, J.A. 189.

pay substandard wages; such practices are thought to "spread and perpetuate such labor conditions among the workers of the several States." See 29 U.S.C. 202(a); *Brooklyn Savings Bank*, 324 U.S. at 706 & n.17; *United States* v. *Darby*, 312 U.S. 100, 115 (1941). Congress specifically considered the impact on competition in its decision to include the commercial activities of non-profit organizations within coverage of the Act. See pages 19-20, *supra*.

It is therefore significant that, as the district court found (Pet. App. 5), "[t]he businesses owned or operated by the Foundation are ordinary commercial businesses which offer goods and services to the general public in competition with for-profit businesses." Accord, Pet. App. 52. Exempting the Foundation from the minimum wage, overtime, and recordkeeping requirements of the Act would confer upon it an unfair competitive advantage over similar businesses. See *Carter* v. *Dutchess Community College*, 735 F.2d 8, 13 (2d Cir. 1984). Were the Foundation and organizations like it not subject to the same requirements as competing businesses, the effect could well be, as Congress feared, to depress the wages of employees working for secular employers under otherwise identical conditions. Cf. *Gemsco, Inc.* v. *Walling*, 324 U.S. 244, 252-254 (1945). Competitors would be sorely pressed to adhere to the wage laws in the face of competition from commercial enterprises held to be exempt from the law because of their religious affiliations.

Thus, Congress has determined that when a non-profit organization chooses to engage in businesses on a basis competitive with others, it must comply with the rules generally applicable to its competitors. As stated by the court of appeals (Pet. App. 53), "[b]y entering the economic arena and trafficking in the marketplace, the foundation has subjected itself to the standards Congress has prescribed for the benefit of employees."

C. *NLRB* v. *Catholic Bishop* Does Not Require An Interpretation Of The Act That Would Exempt The Foundation's Commercial Operations

In *NLRB* v. *Catholic Bishop*, 440 U.S. 490 (1979), this Court held that where the assertion of jurisdiction by a federal agency over activities of a religious organization presents a "significant risk" of infringement of First Amendment rights, the authority will be upheld only if consistent with " 'the affirmative intention of the Congress clearly expressed' " (440 U.S. at 500, quoting *Benz* v. *Compania Naviera Hidalgo*, 353 U.S. 138, 147 (1957)). As the court of appeals concluded (Pet. App. 56-59), application of the minimum wage and recordkeeping requirements of the Act presents no such risk, and even assuming it did, such regulation is in accord with clearly expressed congressional intent.

As discussed in greater detail below, application of the Act to the commercial labors of the Alamo associates does not violate the Religion Clauses of the First Amendment, and indeed it presents no "significant risk" of so doing. The Act touches solely upon the commercial endeavors of the Foundation and its associates, and neither interferes with their ability to practice their faith nor entangles the government in questions of faith and doctrine. The FLSA is neutral, secular legislation, akin to health or safety regulations.

By contrast, in *Catholic Bishop*, the Court was faced with application of the National Labor Relations Act (NLRA) within a pervasively religious setting. This Court found that application of the NLRA to lay teachers in parochial schools would intrude deeply into decisions within the discretion of religious authorities, in light of the "critical and unique role of the teacher in fulfilling the mission of a church-operated school" (440 U.S. at 501). In particular, the Court reasoned, the resolution of unfair labor practice charges would, "in many instances, * * * necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission" (440 U.S. at 502). Moreover, the Court noted, the inevitable

Board inquiries regarding what are mandatory subjects of collective bargaining between the "clergy-administrators" and the unions representing the lay teachers would "implicate sensitive issues that open the door to conflicts" (*id.* at 503). These concerns were especially troubling because the schools in question were pervasively religious and their teaching was a central aspect of the church's religious mission. Since "nearly everything that goes on in the schools" would arguably become subject to collective bargaining (*id.* at 503 (citation omitted)), application of the NLRA would involve the government in explicitly religious affairs of religious institutions.[15]

In any event, even if the risk of First Amendment violation were greater, in this case, unlike *Catholic Bishop*, there is an "affirmative intent of Congress clearly expressed" to cover the commercial activities of non-profit religious organizations. See pages 18-20, *supra*. The Act must be applied in accordance with the clear import of its language and legislative history.

II. APPLICATION OF THE MINIMUM WAGE, OVERTIME, AND RECORDKEEPING REQUIREMENTS OF THE ACT TO THE COMMERCIAL OPERATIONS OF PETITIONERS DOES NOT VIOLATE THE RELIGION CLAUSES OF THE FIRST AMENDMENT OR THE EQUAL PROTECTION COMPONENT OF THE FIFTH AMENDMENT

The sensitivity of church-state relations in the context of government regulation varies with the nature of activity being regulated as well as the character of the regulation. Core religious activities such as worship, liturgy, prayer, formulation of doctrine, preaching, and internal organization are beyond the jurisdiction of government except insofar as they might impinge, in rare cases, on public safety, order, or other fundamental gov-

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[15] Lower courts have held that the NLRA is applicable to the secular activities of religious organizations. See, *e.g.*, *Tressler Lutheran Home for Children* v. *NLRB*, 677 F.2d 302, 305 (3d Cir. 1982); *NLRB* v. *World Evangelism, Inc.*, 656 F.2d 1349, 1353-1354 (9th Cir. 1981); cf *EEOC* v. *Pacific Press Building Ass'n*, 676 F.2d 1272, 1282 (9th Cir. 1982) (Title VII).

ernmental interests. Regulation of the charitable, educational, and social welfare ministries of religious organizations presents a more difficult problem, since they frequently will be viewed as religious by the religious organization but have secular implications from the perspective of government. This case involves none of these difficulties. It involves solely the regulation of the *commercial* operations of religious organizations, in which the congressional authority to regulate commerce is strong and the claim of religious immunity comparatively weak. Caution is appropriate to ensure that the government does not, through such regulation, become impermissibly entangled in the religious affairs of the organization or interfere with the organization's right to define its own structure and ministry. Nonetheless, a religious organization may generally be required, consistent with the First Amendment, to conform its business practices to the rules of the marketplace.

Petitioners claim that application of the minimum wage and recordkeeping provisions of the Fair Labor Standards Act to the Alamo associates working in the Foundation's commercial ventures would violate the Free Exercise Clause (Pet. Br. 29-37), the Establishment Clause (Pet. Br. 37-40), and the Equal Protection component of the Fifth Amendment (Pet. Br. 40-44). Each of these contentions was correctly rejected by the courts below.

A. The Free Exercise Clause Does Not Bar The Government From Applying Minimum Wage, Overtime, And Recordkeeping Requirements To Work By The Alamo Associates In Commercial Businesses

The minimum wage, overtime, and recordkeeping requirements of the Fair Labor Standards Act are secular, neutral requirements applying, with various exceptions not relevant here, to all employers engaged in commercial businesses, as well as to such institutions as hospitals, schools, and transit systems. On its face, the Act neither encourages nor inhibits the practice of religion or the entry of religious organizations into commercial activities.

Persons seeking an exemption from facially neutral requirements of this sort on Free Exercise Clause grounds must demonstrate, in specific ways, that application of the requirement would interfere with the free exercise of their religion. If they so demonstrate, the exemption may still be denied if to grant the exemption would frustrate achievement of an overriding governmental interest. *United States* v. *Lee*, 455 U.S. 252, 256-257 (1982). Petitioners' claim fails on both scores.

1. *The effect on the associates' freedom to practice their religion.* The first step in determining whether the government must be prohibited from applying a facially neutral statute to the activities of an individual is to determine whether application of the statute would interfere with the free exercise of his religion. *United States* v. *Lee*, 455 U.S. at 256-257. The burden is on the party seeking an exemption to present facts that would support the claim. This requirement should be treated with particular rigor where, as here, an employer seeks to avoid its obligation to comply with worker protective legislation on the basis of its employees' purported beliefs. While we do not challenge petitioners' standing to assert the religious views of members of their organization, we do submit that the courts have a responsibility to ensure that it is the associates' religious rights, and not the Foundation's pecuniary interests, that take precedence. Cf. *Donovan* v. *Shenandoah Baptist Church*, 573 F.Supp. 320, 325-326 (W.D. Va. 1983).[16]

Analysis of the Free Exercise claim here is difficult because petitioners have not stated clearly the basis for their objection to the minimum wage laws. They state (Br. 30) that

> [t]he associates desire no compensation for their labor at the Foundation as they consider their work a religious service. They simply want to volunteer their services in furtherance of the Foundation's reli-

[16] We would note that the only associate among the petitioners, Larry LaRouche (Pet. Br. 8), was formerly vice president of the Foundation (Pet. App. 6). It is not clear that he represents the views of the rank-and-file associates.

gious ministries. The application of this Act in this situation violates the associates' right to freely exercise their religious beliefs in that it forces this religious institution to pay wages in prescribed amounts and forces the volunteer worker to accept the same, contrary to his religious convictions.

At page 36 of their brief, petitioners elaborate: to impose upon the Foundation and the associates the regulations set forth in the Fair Labor Standards Act

> is to deny the petitioner, Larry LaRouche, and the other associates of their right to freely *contribute* their time and effort to religious endeavors and to deny them of their right to live in the religious setting of the Foundation, which is based upon a person's desire to freely and entirely give himself to God's work (emphasis in original).

Petitioners also state (Br. 32) that if the Act is applied to the Alamo associates in this context,

> the Act must also be applicable to (1) an individual who volunteers several hours each week to prepare meals for a church congregation on Sunday and Wednesday nights; (2) an individual who volunteers several hours each week to take the church youth to and from church services and related activities; (3) an individual who volunteers his time and effort to maintain the landscaping around the church building; (4) an individual who volunteers several hours each day to solicit pledges for the church budget; and so on and so on.

Finally, petitioners claim (Br. 36-37) that application of the Act to their commercial operations would violate the Free Exercise rights of the associates because it would "quickly lead to the demise of this Christian effort," since charitable organizations depend heavily upon volunteer help.

However, these assertions, which have not been accepted as a factual matter by the lower courts, seriously overstate the case.

a. *Freedom to contribute services.* Application of the Act to the associates' commercial labors, insofar as those

labors are undertaken in exchange for in-kind benefits, does not in any way impinge upon the associates' freedom to *contribute* their time freely to the organization—even to the organization's commercial ventures. True volunteers are not "employees" within the meaning of the Act. The government does not insist that volunteers receive compensation for their services; it insists only that when persons do labor in exchange for compensation they receive such compensation at congressionally-prescribed minima. It follows that the Foundation's ability to use true volunteer help is unaffected. If application of the Act leads "quickly * * * to the demise of this Christian ministry," it will be because the Foundation relies upon undercompensated employees rather than volunteers.

Petitioners' attempted analogy to various volunteer services in connection with the non-commercial activities of a church (such as preparing meals for the congregation or transporting the church youth to activities) is even farther afield. Not only would activities of this kind be exempt if performed by true volunteers; they would also be exempt if they are performed for religious or charitable and not "business purposes" and thus are not part of an "enterprise." See pages 3-4, 17, *supra*.

b. *Freedom to live in a religious community.* Nor, of course, does application of the minimum wage laws infringe upon the associates' "right to live in the religious setting of the Foundation." They are free to do so. It simply means that, if receipt of benefits is conditioned upon labor in the Foundation's commercial establishments, those benefits must satisfy the minimum wage standards.

c. *Receipt of compensation as an infringement on religious liberty.* Further, even if the associates "desire no compensation for their labor at the Foundation" (Pet. Br. 30), this would not mean, as petitioners imply (*ibid.*), that "to accept wages in prescribed amounts" is contrary to the associates' "religious convictions." Not "desiring" additional compensation is not the same thing as believ-

ing that receipt of additional compensation would violate their faith.

Decisions by this Court holding that individuals are exempt from facially neutral requirements on religious grounds have invariably been predicated on a conclusion that the requirement would force the individual to choose between violating a tenet of his faith and suffering a penalty (or foregoing a benefit). *Bob Jones University* v. *United States*, No. 81-3 (May 24, 1983), slip op. 28-29; see *Thomas* v. *Review Board*, 450 U.S. 707, 717 (1981) ("choice between fidelity to religious belief or cessation of work"); *Sherbert* v. *Verner*, 374 U.S. 398 (1963) (same); *Wisconsin* v. *Yoder*, 406 U.S. 205, 218 (1972) (secondary schooling requirement "contravenes the basic religious tenets and practice of the Amish faith"); *Follett* v. *Town of McCormick*, 321 U.S. 573 (1944) (license requirement would prevent individual from "preaching the gospel"); *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943) (same). The Free Exercise Clause accords special protection to "religiously motivated claims of conscience." *Marsh* v. *Chambers*, No. 82-23 (July 5, 1983), slip op. 17 (Brennan, J., dissenting). It does not, however, protect any or all religiously motivated "desires." Nor can a claim of an infringement on religious liberty be based on no more than an assertion of its existence.

Petitioners rather vaguely assert (Br. 30) that forcing "the volunteer worker" to accept "wages in prescribed amounts" is "contrary to his religious convictions." Without explaining the significance of the comments, petitioners quote (Br. 31) two representative associates, Ann Elmore and Bill Levy, to the effect that the thought of compensation is "vexing to my soul" (J.A. 79) and that to be forced to take a wage "offends my right to worship God as I choose" (J.A. 63)[17] Neither of these statements, however, is especially illuminating. There is nothing peculiarly religious about Elmore's sentiment. Persons may be vexed for entirely non-religious reasons by what they feel to be the anti-communitarian quality of making explicit the nexus between what they do and what they get. And Levy's statement, while making clear that the source of his objection is religious, leaves the courts entirely in the dark regarding what it is about the minimum wage laws that he finds objectionable. For amplification, it is necessary to examine these associates' other comments and actual behavior.

[17] Levy also objected to the recordkeeping requirement (Pet. Br. 31-32; J.A. 59); however, this adds little to petitioners' Free Exercise claim. The Act requires employers, not employees, to maintain records, and requires only records of time spent in commercial activities. It is difficult to see, therefore, how the recordkeeping requirements could interfere with Levy's free exercise of religion. His complaint that "before you know it, I would be just doing nothing but filling sheets all day long" (J.A. 59) is not unique to religious persons; the Alamo associates, like other persons, have an appropriate forum for relief if they believe that reporting and recordkeeping requirements are unnecessarily burdensome. See 44 U.S.C. 3501 *et seq.*

The record clearly belies the suggestion that Elmore or Levy objected to receiving compensation of any kind. Both in fact received substantial food, lodging, medical, and other in-kind benefits in return for their services. See J.A. 61, 74-75. Indeed, Elmore stated (J.A. 78) that she expected these benefits "as a matter of—of course," since "we went out and worked for them.'"[18] And Levy described the benefits as "great benefits" that are "obviously well and above what you could get if you had a minimum wage scale" (J.A. 62).

Moreover, it is clear that the associates had no religious objection to owning money. Elmore, for example, "had some money from an investment that I lived off of" (J.A. 72).[19] Nor did they object to receiving a wage; some

[18] She also commented that "if you want to eat, you've got to work" (J.A. 76).

[19] This case does not, therefore, involve anything akin to a vow of poverty. This Court thus need not address the different, and perhaps more difficult, constitutional questions that might arise if the Act were applied to persons in such a way as to preclude fidelity to such a vow.

associates, with the sanction of the Foundation, took jobs outside the Foundation for which they received wages, presumably at or above the statutory minimum. See J.A. 186, 207. Nor does there appear to have been any religious requirement that the associates' standard of living be at a low or subsistence level. The associates seemed quite pleased with the perceived high level of benefits (see, *e.g.*, J.A. 62, 75, 89), and felt no reluctance to claim that, with the Foundation's increasing prosperity, "we were all rich" (J.A. 189).

The Foundation could, therefore, comply with the minimum wage laws without violating the religious beliefs of the associates. All it need do is provide in-kind benefits and demonstrate that they are at a level sufficient to satisfy the statutory standard.[20] Or, if it chose to supplement the benefits with cash wages, the associates could donate the money back to the Foundation, much as they do their earnings from outside employers. So long as such donations were given freely, without unlawful coercion, the arrangement would provide a means for complying with the minimum wage law. See *Marshall* v. *Seventh Day Adventists*, 23 Wage & Hour Cas. (BNA) 316, 318 (C.D. Cal. 1977).

Nothing in the allegations or evidence presented by petitioners demonstrates that compliance with the Act is impossible without violation of the associates' religious beliefs. In the absence of such a demonstration, this Court should not invalidate a major federal regulatory program on the basis of generalized or speculative suggestions regarding religious convictions.

2. *The governmental interest.* Even assuming that application of the Act to the commercial labors of the associates would infringe upon their free exercise of religion, the regulatory program must still be sustained if it is justified by an "overriding governmental interest." *United States* v. *Lee*, 455 U.S. at 257-258; see *Bob Jones*

[20] The Act does not require that the minimum wage be paid in cash. See 29 U.S.C. 203(m). Therefore, if the associates objected to receiving cash wages, the Foundation would still be able to comply with the Act.

University, slip op. 28. The government has two significant interests in applying the minimum wage laws to persons employed in commercial businesses owned by religious organizations.

First, the government has an interest in protecting workers in commerce from substandard wages. "The principal congressional purpose in enacting the Fair Labor Standards Act of 1938 was to protect all covered workers from substandard wages and oppressive working hours, 'labor conditions [that are] detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers.'" *Barrentine* v. *Arkansas-Best Freight System*, 450 U.S. at 739, quoting 29 U.S.C. 202(a). Congress determined that minimum wage legislation is necessary because of the lack of bargaining power generally within the reach of employees in the lowest paying jobs. *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. at 706-707 & n.18. This interest in guaranteeing each worker a minimum standard of living is no less strong merely because the businesses in which some persons work are owned by religious or other non-profit organizations. See *Mitchell* v. *Pilgrim Holiness Church Corp.*, 210 F.2d at 884; cf. *Prince* v. *Massachusetts*, 321 U.S. 158 (1944).

Petitioners contend (Br. 33) that this governmental interest is insubstantial because testimony by representative associates showed that they enjoyed a high standard of living. Precisely how generous were the benefits provided to the associates, however, is a matter of dispute. Pet. App. 13. If petitioners can show on remand that the benefits they provide the associates are in fact the equivalent of the minimum wage, then they will be found in compliance with Section 6 of the Act.[21] If the benefits fall below the statutory level, it suggests that the associates may need the protections of the Act.

Second, aside from protection of the Alamo associates themselves, the government has an interest in protecting other commercial enterprises from competition from em-

[21] The Foundation would still be required to comply with the Act's recordkeeping and overtime requirements.

ployers that pay substandard wages. Congress has found that the payment of substandard wages "constitutes an unfair method of competition in commerce" (29 U.S.C. 202(a)(3)). Enforcement of the Act would be seriously undermined if the government were forced to permit some businesses to pay substandard wages, while requiring their competitors to comply with the Act. The marketplace does not distinguish between goods produced under religious auspices by the faithful and those manufactured in secular establishments by non-believers. Where activities engaged in by a religious organization result in the production of goods and services that compete in interstate commerce, the government has an interest in ensuring that all competitors are subject to the same rules. See 107 Cong. Rec. 6255 (1961) (statement of Sen. McNamara).

The strength of the governmental interest here is comparable to that of the requirements upheld against Free Exercise challenges in *United States* v. *Lee*, *supra*, and *Braunfeld* v. *Brown*, 366 U.S. 599 (1961). Like the social security tax at issue in *Lee*, the minimum wage law is a "comprehensive national" system, that would be difficult to administer in the face of "myriad exceptions flowing from a wide variety of religious beliefs." 455 U.S. at 258, 260. And as was the case with the Sunday closing laws at issue in *Braunfeld*, to carve out religiously-based exemptions from the minimum wage law "might well provide these people with an economic advantage over their competitors." 366 U.S. at 608.[22]

Petitioners' arguments for exemption from coverage of the Act are more properly directed to Congress, which has the authority to make accommodations to the religious

[22] *Murdock* v. *Pennsylvania*, *supra*, and *Follett* v. *Town of McCormick*, *supra*, relied upon by petitioners (Br. 34-36), are easily distinguishable. Both cases concerned the dissemination of explicitly religious materials, whereas in this case the activities that the government seeks to regulate are commercial. This is precisely the distinction drawn in *Murdock*, 319 U.S. at 111. Moreover, the governmental interest in *Murdock* and *Follette*—the raising of revenue—could easily be satisfied through alternative sources. See *Braunfeld* v. *Brown*, 366 U.S. at 607 n.4.

interests of the people, even where such accommodation is not required by the Free Exercise Clause. *McDaniel* v. *Paty*, 435 U.S. 618, 639 (1978) (Brennan, J., concurring); *Zorach* v. *Clauson*, 343 U.S. 306 (1952). Between the mandates of the Free Exercise Clause and the strictures of the Establishment Clause, Congress has significant discretion to determine whether religious exemptions from otherwise neutral requirements would be appropriate.

Indeed, the drafters of the Bill of Rights expected that principal responsibility for protecting religious interests in the context of neutral governmental requirements would rest with the states and the Congress. Exemptions from compulsory military service—perhaps the paradigm of permissive governmental accommodation of religious belief—were discussed by members of the First Congress during their deliberations on what is now the Second Amendment. The House of Representatives adopted by a narrow margin (24-22) a proposal that would have exempted religious conscientious objectors from military duty. 1 Annals of Cong. 778, 780 (Aug. 17, 1789) (J. Gales ed. 1834). The Senate rejected the inclusion of this provision in the Bill of Rights and it was deleted in conference. Opposition to the proposal was based, in large part, on the view that "[n]o man can claim this indulgence of right. It * * * ought to be left to the discretion of the Government" (*id.* at 780 (statement of Rep. Benson)).

This history accords with the Court's frequent recognition that the government has the discretion to exempt religious and similar institutions from general regulations where to do so would enhance religious liberty and not interfere with achievement of the underlying policy. *E.g.*, *United States* v. *Lee*, 455 U.S. at 260-261; *St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U.S. 772 (1981); *NLRB* v. *Catholic Bishop*, 440 U.S. 490 (1979); *Wisconsin* v. *Yoder*, 406 U.S. 205, 234-235 n.22 (1972); *Gillette* v. *United States*, 401 U.S. 437 (1971); *Walz* v. *Tax Commission*, 397 U.S. 664 (1970).

The area of mandatory accommodation, where this Court has concluded that the Free Exercise Clause mandates special treatment for religious claims, absent an overriding governmental interest, is strictly limited to direct clashes between governmental requirements and religious scruple. See page 36, *supra*. The scope for discretionary accommodations by Congress and the states is much wider.

Congress has enacted provisions that have the effect of significantly accommodating religious practices in the context of the minimum wage laws. Cf. *United States* v. *Lee*, 455 U.S. at 260-261. It has not extended those laws to the noncommercial aspects of activities of religious and other non-profit organizations (see pages 3-4, *supra*), and it has left room for an interpretation of the Act by the Department, under a variety of sources of authority and in accordance with suggestions in the legislative history, that would not cover members of religious orders working pursuant to religious obligation in hospitals, schools, and similar covered, but noncommercial, activities operated by their order (see page 5, *supra*). In addition, the exemptions for professionals (see page 3, *supra*) and the lack of coverage of self-employed persons (including members of bona fide cooperatives) have the effect of removing from coverage many clergy and members of religious communities. If Congress were to enact carefully-tailored provisions for limited commercial activity by self-supporting religious communities, they would likely pass muster under the Establishment Clause. Cf. 26 U.S.C. 512(b)(15). But Congress has not done so, and nothing in petitioners' submission suggests that the Constitution affirmatively mandates it.

Petitioners' rather extravagant claims for exemption from the Act go well beyond anything that Congress has contemplated. Commercial activities of the sort at issue here—gasoline stations, construction companies, restaurants, retail stores—are at the core of the Act's coverage. To exclude full-time workers in these businesses from the protections of the Act (while continuing to require the Foundation's competitors to comply) would open a major

loophole. As in *United States* v. *Lee*, 455 U.S. at 260-261, "Congress has accommodated, to the extent compatible" with the policies of the Act, religious practices that would be adversely affected, "but every person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs." Congress has "dr[awn] the line," and the minimum wage legislation "imposed on employers * * * must be uniformly applicable to all, except as Congress provides explicitly otherwise." *Id.* at 261 (footnote omitted).

B. Application Of The Minimum Wage, Overtime, And Recordkeeping Requirements Of The Act To The Commercial Operations Of The Foundation Does Not Violate The Establishment Clause

Petitioners contend (Br. 37-40) that application of the Act to their commercial activities would also violate the Establishment Clause, both because it would "seriously inhibit religious activity" (Br. 38) and because it would foster "excessive government entanglement with religion" (Br. 39).[23] This argument was correctly rejected by the courts below.

Application of the minimum wage would, according to petitioners (Br. 38-39), inhibit the practice of religion because "charitable and religious organizations would not be able to provide the services they currently make available if it were not for the labor of volunteers." However, as the court of appeals pointed out (Pet. App. 56), the Act "has nothing to do with religion, and neither ad-

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[23] We question whether the Establishment Clause is the proper source of the constitutional interests invoked by petitioners. But see generally Esbeck, *Establishment Clause Limits On Governmental Interference With Religious Organizations*, 41 Wash. & Lee L. Rev. 347 (1984). This Court has never struck down a regulatory program on Establishment Clause grounds. In *NLRB* v. *Catholic Bishop*, *supra*, which raised issues in some ways similar to these (see pages 30-31, *supra*), the Court simply referred to the Religion Clauses, rather than to the Free Exercise or Establishment Clauses individually. Use of the Establishment Clause in this context is difficult to justify in light of the historical understanding of the term "establishment."

vances nor inhibits religious concerns." Accord, *Donovan* v. *Shenandoah Baptist Church*, 573 F.Supp. at 324. Nor does the Act interfere with the Foundation's right to use genuine volunteers. All the Act requires of the Foundation is to comply with generally-applicable regulations for employment in commercial enterprises.

Enforcement of the Act's recordkeeping requirements would, according to petitioners (Br. 39-40), "produce a continuing day-to-day relationship between a church (and its policies) and the Government," and thus violate the Establishment Clause. Significantly, however, each of the examples of "excessive entanglement" offered by petitioners involves volunteer work by individuals in connection with the internal religious functions of a church—preparing meals for church members on Sunday and Wednesday nights prior to prayer meetings, doing carpentry work around the church building, and so on. Such examples would not be covered by the Act, since by hypothesis they are performed by volunteers and the activities described would not appear to be for "business purposes."

Petitioners' selection of examples is telling because the concept of "excessive entanglement" applies essentially to religious matters. The purpose of the Religion Clauses in this area is to "keep the state from interfering in the essential autonomy of religious life." *Marsh* v. *Chambers*, slip op. 9 (Brennan, J., dissenting). Secular authorities have no competence to deal with questions of faith, discipline, or church organization. But government actions of a purely secular character—for example, safety, health, zoning, or fire code regulations—are permissible despite the resultant contacts between governmental and religious authorities. *Lemon* v. *Kurtzman*, 403 U.S. 602, 614 (1971); *Braunfeld* v. *Brown*, 366 U.S. at 613-614; *Prince* v. *Massachusetts*, 321 U.S. at 166-167; *Cox* v. *New Hampshire*, 312 U.S. 569, 574 (1941).

Here, the governmental contacts are highly unproblematical. Neither this Court nor any other has held that the employment relationship between a church and its nonecclesiastical employees is an internal religious matter not subject to government regulation. See *St. Elizabeth Hospital* v. *NLRB*, 715 F.2d 1193, 1196-1197 (7th Cir. 1983); *EEOC* v. *Southwestern Baptist Theological Seminary*, 651 F.2d 277, 287 (5th Cir. 1981), cert. denied, 456 U.S. 905 (1982); *Turner* v. *Unification Church*, 473 F. Supp. 367, 371-372 (D. R.I. 1978), aff'd on other grounds, 602 F.2d 458 (1st Cir. 1979); *Marshall* v. *First Baptist Church*, 23 Wage & Hour Cas. (BNA) 386 (D. S.C. 1977). The relationship sought to be regulated—that between the Foundation and its workers in commercial ventures—is essentially secular. Cf. *NLRB* v. *Catholic Bishop*, 440 U.S. at 504 (church-teacher relationship in a religious school is infused with religious considerations). And the government's role is strictly limited to secular questions regarding hours worked and wages paid.

Petitioners rely especially on the recordkeeping requirements to support their Establishment Clause argument. See Pet. Br. 37-38. However, the records required to be kept, concern such innocuous, secular matters as employee names, hours worked, and wages paid. 29 C.F.R. 516; see *Donovan* v. *Shenandoah Baptist Church*, 573 F. Supp. at 325; *Donovan* v. *Central Baptist Church*, 25 Wage & Hour Cas. (BNA) 815, 817 (S.D. Tex. 1982). The recordkeeping requirements pertain only to the employer's commercial activities; the Foundation need make no report about its associates' time spent in witnessing, praying, preaching, or other religious activities. No questions of religion would enter into the records. These recordkeeping requirements are, indeed, less extensive and intrusive than those upheld against Establishment Clause challenge in *Committee for Public Education & Religious Liberty* v. *Regan*, 444 U.S. 646, 659-661 (1980); see also *EEOC* v. *Southwestern Baptist Theological Seminary*, *supra* (upholding requirement of biennial report monitoring Title VII compliance, including, inter alia, salary, job description, race, gender, and national origin of all seminary employees other than ministers); *United States* v. *Holmes*, 614 F.2d 985, 989 (5th Cir. 1980) (upholding

tax summonses to determine propriety of church's claim of tax-exempt status).

It is well established that when a religious organization engages in secular, commercial activities, it becomes subject to secular authority. As this Court stated in *United States* v. *Lee*, 455 U.S. at 261, "[w]hen followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." For example, income generated by a church's unrelated trade or business is subject to federal taxation, with all the recordkeeping that entails. 26 U.S.C. 511, 513. And a religious organization that chooses to operate as a broadcasting licensee must comply with F.C.C. rules regarding employment. *King's Garden, Inc.* v. *FCC*, 498 F.2d 51, 60 (D.C. Cir.), cert. denied, 419 U.S. 996 (1974). Here, the Alamo Foundation has chosen to engage in a wide variety of commercial businesses, in competition with for-profit companies. It must, therefore, comply with facially neutral rules governing the employment relation in commerce.

C. Treatment Of Foundation Associates As Employees, And ACTION Volunteers As Volunteers, Has A Rational Basis And Does Not Violate The Equal Protection Component Of The Fifth Amendment

Petitioners contend (Br. 40-44) that the application of the Act to their commercial operations violates the equal protection guarantee of the Fifth Amendment because Congress has not applied the Act to volunteers in programs supervised by the federal government, such as ACTION. This argument is frivolous.

The standards under which such a claim is to be evaluated have been set forth many times by this Court. See, *e.g.*, *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 461 (1981); *McGowan* v. *Maryland*, 366 U.S. 420, 425 (1961). A classification treating some groups differently than others, unless based on suspect categories or affecting fundamental rights, must be upheld if it has a

rational basis; that is, unless the classification rests on grounds wholly irrelevant to the achievement of the governmental objective.

The activities of federal volunteers are limited by the government itself and subject to government control and supervision. Moreover, unlike the Alamo endeavors, work in government volunteer programs is restricted to "activities which would not otherwise be performed by employed workers and which will not supplant the hiring of or result in the displacement of employed workers." 42 U.S.C. 5044(a). Accordingly, Congress could rationally have concluded that minimum wage coverage of such volunteers is needed neither for their own protection nor for the prevention of unfair competition with private employers.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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